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STATE OF NEVADA; WILLIAMS MOLINI, RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, HO-CHUNK NATION, LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA, PUEBLO OF ISLETA, AND ST. CROIX CHIPPEWA INDIANS OF WISCONSIN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* TRIBES 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. TRIBAL COURTS RETAIN CIVIL ADJUDICATORY JURISDICTION OVER ACTIONS BETWEEN INDIANS AND NON-INDIANS THAT ARISE ON INDIAN LANDS 4

A. This Court has long held that tribal courts have inherent sovereign authority to adjudicate civil disputes between Indians and non-Indians arising on Indian lands 4

B. The decisions in *Strate* and *Montana* recognize that Indian tribes have inherent sovereign authority to exercise civil jurisdiction over non-Indians on Indian lands 10

C. *Strate* establishes that the main rule of *Montana* and the two *Montana* exceptions only apply to the exercise of tribal inherent sovereign authority over non-Indians on non-Indian-owned fee lands 14

D. In furtherance of the Self-Determination policy Congress has encouraged tribal courts to develop and operate effectively, and recognized that these courts exercise general civil adjudicatory jurisdiction over non-Indians 17

E. The power to adjudicate civil disputes arising on a sovereign's territory, whether involving citizens or non-citizens, is essential to the success of the Self-Determination policy and a necessary attribute of sovereignty for Indian tribes as well as other governments 21

CONCLUSION 25

TABLE OF AUTHORITIES

CASES:

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989) 15

California v. Cabazon Band of Indians, 480 U.S. 202 (1987) 11, 12, 21, 22

Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) 22

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 25

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 9, 14

Fisher v. District Court, 424 U.S. 382 (1976) 8

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 12

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ..... *passim*

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 7

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) ..... *passim*

Montana v. United States, 450 U.S. 544 (1981) ..... *passim*

Morris v. Hitchcock, 194 U.S. 384 (1904) 11

National Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985) ..... *passim*

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 2, 11, 13, 21

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978) 2, 9

Ramah Navajo Sch. Bd. v. Bureau of Revenue,
458 U.S. 832 (1982) 22

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 2, 8

South Dakota v. Bourland,
508 U.S. 679 (1993) 15

Strate v. A-1 Contractors,
520 U.S. 438 (1997) ..... *passim*

Talton v. Mayes,
163 U.S. 376 (1896) 5

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g,
476 U.S. 877 (1986) 7

United States v. Mazurie,
419 U.S. 544 (1975) 12

United States v. Wheeler,
435 U.S. 313 (1978) 4, 9

United States ex rel. Mackey v. Cox,
59 U.S. (18 How.) 100 (1855) 5

Washington v. Confederated Tribes of the Colville Indian Reservation,
447 U.S. 134 (1980) 2, 11, 12, 22

White Mountain Apache Tribe v. Bracker,
448 U.S. 138 (1980) 21

Williams v. Lee,
358 U.S. 217 (1959) ..... *passim*

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832) 6

STATUTES:

Indian Civil Rights Act of 1968,
25 U.S.C. §§1301 *et seq.* 17

Indian Reorganization Act of 1934,
25 U.S.C. §§ 461 *et seq.* 6

Indian Tribal Justice Act,
25 U.S.C. §§ 3601 *et seq.* ..... *passim*

LEGISLATIVE MATERIALS AND RULES

H. Rep. No. 205, 103d Cong.,
1st Sess. (1993) 18, 19

S. Rep. No. 88, 103d Cong.,
1st Sess. (1993) 18, 19, 20

H.R. Conf. Rep. No. 383, 103d Cong.,
1st Sess (1993) 19

139 Cong. Rec. H10259 (daily ed. Nov. 19, 1993) 18

139 Cong. Rec. S9172 (daily ed. July 21, 1993) 20, 21

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

OTHER:

HENRY M. HART, JR. AND ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eskridge and Frickey, ed. 1994) 25

INTEREST OF *AMICI CURIAE* TRIBES[1]

Amici, Confederated Tribes of the Colville Reservation, Ho-Chunk Nation, Pueblo of Isleta, Lac du Flambeau Band of Lake Superior Chippewa, and St. Croix Chippewa Indians of Wisconsin, respectfully submit this brief *amici curiae* in support of Respondents by and through their attorneys pursuant to Sup. Ct. R. 37.3. *Amici* are all federally-recognized Indian tribes. *Amici* tribes have established tribal courts to enforce applicable law and resolve disputes arising on reservation lands. All *amici* tribes are engaged in efforts to pursue self-determination and self-sufficiency. Non-Indians are frequently present on *amici* tribes' lands as residents, tourists, employees, in connection with leases, contracts, or routine day-to-day interaction with tribal government and enterprises, or as patrons of tribal businesses. With the increased commercial activity occurring on Indian lands in recent years, *amici* have experienced a steady increase in civil cases involving non-Indians in their tribal courts. The tribal courts regularly hear and resolve civil disputes involving non-Indians arising on Indian lands. *Amici* consider recognition of tribal civil adjudicatory jurisdiction essential, indeed critical, to the maintenance of a stable, well-ordered civil society and to their ability to provide a rule of law which governs the expectations of persons and entities living, visiting, and doing business in *amici's* tribal territory. Therefore, *amici* have an interest in a recognition of their sovereign authority to establish and maintain tribal courts to adjudicate civil disputes involving non-Indians that arise on Indian lands.

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[1] The parties have consented to the filing of this brief in letters that have been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Sup. Ct. R. 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. This Court established in *Williams v. Lee*, 358 U.S. 217 (1959) that Indian tribes have retained their power to adjudicate civil disputes between Indians and non-Indians arising on Indian lands. In this regard, it was settled in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) that "the reasoning of *Oliphant [v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)] does not apply" to bar tribal courts from adjudicating civil suits against non-Indian parties. 471 U.S. at 854-55. The Court's statement in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978), that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," thus reflects settled law.

2. This Court's recognition in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) that "tribes retain considerable control over nonmember conduct on tribal land," *id.* at 454, is in accord with *Williams* and is confirmed by the decisions of this Court upholding tribal civil regulatory authority over non-Indians on Indian land. *See, e.g., New Mexico v. Mescalero Apache*, 462 U.S. 324 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). These decisions confirm the existence of tribal civil adjudicatory jurisdiction over non-Indians, for "where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate*, 520 U.S. at 453 (quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). Alternatively, tribal civil jurisdiction over such disputes is sustained by the tribes' power to exclude non-Indians from such lands, which includes the power to condition non-Indian conduct on Indian lands. *Merrion*, 455 U.S. at 144.

3. As the Court in *Strate* made clear, the main rule and exceptions in *Montana v. United States*, 450 U.S. 544 (1981) apply only to claims of tribal civil jurisdiction over non-Indian activity on non-Indian-owned fee land. *Strate*, 520 U.S. at 456-60. The nature of the distinction between non-Indian owned fee land and Indian land is apparent from the *Montana* decision, in which the Court considered the effect of a statute that had taken Indian land to provide it to homesteaders. As to such lands, the Court stated, Congress would not have intended to subject the purchaser to tribal jurisdiction. *Montana*, 450 U.S. at 560 n.9. Similarly, in *Strate*, the Court held that the tribe had lost its right to exercise dominion or control over the right-of-way, which was open to the public as part of the State highway system. *See Strate*, 520 U.S. at 455-56. The distinction reflected in these cases has no application to Indian lands. However, even if one assumes, *arguendo*, that the *Montana* exceptions have some application to Indian lands, tribal civil adjudicatory jurisdiction is sustained under these exceptions for the reasons stated in points 1 and 2 above.

4. Congress has "consistently encouraged the . . . development" of tribal courts. *LaPlante*, 480 U.S. at 14-15 n.6. In 1993, for example, Congress enacted the Indian Tribal Justice Act, 25 U.S.C. §§ 3601 *et seq.*, *inter alia* to provide federal funding support for tribal courts equal to that of equivalent state courts. In the 1993 Act, Congress recognized that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5).

5. Indian tribes are pursuing the federal goals of self-determination and self-sufficiency by seeking to improve the reservation environment for all persons interested in tribal affairs, whether for social, entertainment, community, or business purposes. Their success to date has made the

importance of tribal civil adjudicatory jurisdiction over disputes involving non-Indians arising in tribal territory even more apparent. Such jurisdiction is essential to the tribe's ability to maintain a stable environment for community and business growth, and to the achievement of the Congressional goals of tribal self-determination and tribal self-sufficiency.

ARGUMENT

I. TRIBAL COURTS RETAIN CIVIL ADJUDICATORY JURISDICTION OVER ACTIONS BETWEEN INDIANS AND NON-INDIANS THAT ARISE ON INDIAN LANDS

A. This Court has long held that tribal courts have inherent sovereign authority to adjudicate civil disputes between Indians and non-Indians arising on Indian lands

"Originally the Indian tribes were separate nations within what is now the United States." *Williams v. Lee*, 358 U.S. 217, 218 (1959). As separate nations they "exercised virtually unlimited power over their own members as well as those who were permitted to join their communities." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Then, as now, Indian tribes relied on their inherent sovereignty as a source of power to govern. As the Court explained in *United States v. Wheeler*, 435 U.S. 313 (1978), "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323.

That tribal inherent sovereign authority includes judicial power in civil and criminal matters was decided long ago. In *United States ex rel. Mackey v. Cox*, 59 U.S. (18 How.) 100 (1856), the Court held that letters of administration granted by the Cherokee Nation's probate court were entitled to full faith and credit under the terms of an 1812 Act which authorized persons holding such letters when issued "by the proper authority in any of the United States or the territories thereof," to bring suit in the District of Columbia as if the letters of administration had been granted there. *Id.* at 103. In *Talton v. Mayes*, 163 U.S. 376 (1896), a Cherokee Indian had challenged his murder conviction in tribal court on the ground that he had been indicted by a grand jury consisting of only five jurors in violation of the Fifth Amendment of the U.S. Constitution and the Constitution and laws of the Cherokee Nation. The Court held that the Cherokee Nation's powers of self-government existed prior to the Constitution and were not operated upon by the Fifth Amendment, *id.* at 384, and that the claim made under tribal law "was solely a matter within the jurisdiction of the courts of that nation." *Id.* at 385.

That Indian tribes have retained their power to adjudicate civil disputes between Indians and non-Indians that arise on Indian lands was established in *Williams v. Lee*, which in turn relied principally on the historic decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). As the *Williams* Court explained, *Worcester* arose from Georgia's enactment of laws that sought to prohibit the Cherokee Nation "from enacting laws *or holding courts* and [that] prohibited outsiders from being on the Reservation [without the] . . . permission of the State Governor." *Williams*, 358 U.S. at 218 (emphasis added). "Chief Justice Marshall held that Georgia's assertion of power was invalid. The Cherokee Nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no

right to enter, *but with the assent of the Cherokees themselves*, or in conformity with treaties, and with the acts of Congress." *Id.* at 219 (emphasis added) (quoting *Worcester*, 6 Pet. at 561). The *Williams* Court then held that while the principles of *Worcester* have been modified "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . the basic policy of *Worcester* has remained." *Williams,* 358 U.S. at 219.

Congress had recognized these same principles, the Court further found. In 1834, Congress acted to "assure adequate government of the Indian tribes" by enacting statutes that regulated trade with Indian tribes and organizing a Department of Indian Affairs. *Id.* at 220. A century later, Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, which sought to "encourage[] tribal governments and courts to become stronger and more highly organized." *Id.* Furthermore, the Court held when Congress has intended to grant the States "the jurisdiction which *Worcester v. Georgia* had denied" it has done so expressly. *Id.* at 221 (footnote omitted).

Applying these principles, *Williams* ruled that the Tribe had exclusive jurisdiction over a civil suit by a non-Indian reservation trader to collect a debt from an Indian, because "the exercise of state jurisdiction . . . would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. In so holding, the Court recognized, relying on *Worcester*, that relations between Indians and non-Indians on tribal territory are properly considered an internal affair of the Tribes, and are subject to the exercise of tribal jurisdiction. "Implicit in these treaty terms, as it was in the treaties with the Cherokees . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Id.* at 221-22. Thus, the

Court held, "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223 (citations omitted). The principles of *Williams* apply whether the plaintiff is an Indian and the defendant a non-Indian, or vice-versa. In both cases, tribal jurisdiction over such disputes is essential to tribal self-government, for the exercise of such jurisdiction is necessary not only to insure the resolution of such conflicts in an efficient, fair and peaceful manner, but also to provide the rule of law which governs the expectations of persons and entities living, visiting and doing business in tribal territory. In the absence of such authority, Indian tribes would be deprived of the power to make the common law that governs sovereign territory and relations between persons and entities – Indians and non-Indian – that are present there. This is a critical element of the right to self-government for any sovereign.[2] *Williams* thus conclusively sustains a tribal court's authority to determine disputes involving a non-Indian party that arise in tribal territory. *See also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179 (1973) ("cases applying the *Williams* test have dealt principally with situations involving non-Indians").

The principles of *Williams* have also served as the foundation for this Court's decisions recognizing the importance of the civil jurisdiction of tribal courts. It was well established two decades ago that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal

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[2] The question of the existence of tribal civil adjudicatory jurisdiction is obviously distinct from the issue of whether a state court has jurisdiction over an Indian's voluntary filing of an action in state court as a plaintiff. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986).

and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted). The protection that *Williams* affords from State jurisdiction also remains in force, as the Court made clear in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). "[S]tate courts may not exercise jurisdiction over disputes arising out of on-reservation conduct – even over matters involving non-Indians – if doing so would 'infring[e] on the right of reservation Indians to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 452-53 (quoting *Fisher v. District Court*, 424 U.S. 382, 386 (1976) (quoting *Williams*, 359 U.S. at 220)). As these decisions recognize, litigation in a forum other than the tribe's simply "cannot help but unsettle a tribal government's ability to maintain authority." *Santa Clara Pueblo*, 436 U.S. at 60.

The policy of *Williams* is further reflected in the tribal court exhaustion rule announced by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and reaffirmed in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Court concluded in *LaPlante* that the assumption of jurisdiction over reservation affairs "by any nontribal court . . . infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *LaPlante*, 480 U.S. at 16. In order to further the federal policies of tribal self-government and self-determination, the orderly administration of justice, and to secure the benefits of the tribal court's expertise, the exhaustion rule requires that challenges to tribal court jurisdiction be heard first in tribal court. *See National Farmers Union*, 471 U.S. at 856-58.

As *Santa Clara Pueblo* and the exhaustion rule cases confirm, tribal courts have the authority and responsibility to decide questions of federal law, including claims under the Indian Civil Rights Act, *Santa Clara Pueblo*, 436 U.S. at 65-66, and federal law challenges to the subject matter jurisdiction

of tribal courts. As the Court explained in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law . . . ." *Id.* at 485 n.7.

It is also clear that the jurisdiction of tribal courts over non-Indians in civil matters is not limited as it is in criminal cases. As the Court held in *National Farmers Union*, "[f]or several reasons . . . the reasoning of *Oliphant* [*v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)] does not apply" to bar tribal courts from adjudicating civil suits against non-Indians. *National Farmers Union,* 471 U.S. at 854. The Court reaffirmed this holding in *LaPlante*, 480 U.S. at 15. As the Court explained in *National Farmers Union*, while Congress created federal criminal jurisdiction over non-Indians committing crimes on reservations, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *National Farmers Union*, 471 U.S. at 854 (footnote omitted). Furthermore, the Court observed that the Attorney General's Opinion of the mid-nineteenth century relied on in *Oliphant* had concluded that tribes had no criminal jurisdiction over non-Indians but did retain the power to determine civil controversies arising on their reservations. *Id.* at 854-55.

The decisions of this Court thus establish that Indian tribes retain the full scope of their civil jurisdiction over non-Indian activity on Indian lands, and that this is an "aspect[] of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323 (citation omitted). *Williams* recognizes, as does *Worcester*, that control of non-Indian conduct on Indian lands is within the scope of a tribe's internal affairs, over which tribal authority is retained and that the exercise of tribal civil adjudicatory jurisdiction over disputes

between Indians and non-Indians arising on Indian lands is essential to tribal self-government. *Williams*, 358 U.S. at 221-23. Indian tribes were certainly not divested of this authority by treaty, as *Williams* and *Worcester* show. Nor is there any basis for such a claim in the federal statutes – to the contrary, as we show *infra*, Congress has been steadfast in its support for tribal courts, and has recognized their jurisdiction over Indians and non-Indians. Indeed, the Court in *LaPlante* expressly rejected a claim that the federal grant of diversity jurisdiction had limited the civil jurisdiction of tribal courts, *LaPlante*, 480 U.S. at 18, a holding which *Strate* reaffirms. *See Strate*, 520 U.S. at 452. Finally, as we have shown, settled law makes clear that Indian tribes have not been implicitly divested of their civil jurisdiction over suits against non-Indians pursuant to the principles of *Oliphant*. *See LaPlante*, 480 U.S. at 15; *National Farmers Union*, 471 U.S. at 854-55.

B. The decisions in *Strate* and *Montana* recognize that Indian tribes have inherent sovereign authority to exercise civil jurisdiction over non-Indians on Indian lands

The decisions in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and *Montana v. United States*, 450 U.S. 544 (1981) both expressly recognize that tribal civil jurisdiction extends over non-Indians on Indian lands. In *Montana*, the Court held that it could "readily agree" with the ruling of the Court of Appeals "that the Tribe may prohibit nonmembers from hunting and fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." *Montana*, 450 U.S. at 557. In *Strate*, the Court reaffirmed this ruling and the broader principle that "tribes retain considerable control over nonmember conduct on tribal land." *Strate*, 520 U.S. at 454 (footnote omitted).

The Court's conclusions reflect well-settled law. As we have shown above, *Williams* establishes that tribal inherent sovereign power to adjudicate civil disputes involving Indians and non-Indians on Indian lands has been retained. The Court has also made clear that Indian tribes have broad civil regulatory authority over non-Indian activity on Indian lands. As the Court held in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), "tribes have the power to manage the use of their territory and resources by both members and nonmembers . . . to undertake and regulate economic activity within the reservation . . . and to defray the cost of governmental services by levying taxes." *Id.* at 335-36 (citations omitted). Indeed, in *Mescalero*, the Court expressly relied on *Montana* in upholding tribal power to regulate the use of tribal lands and resources, including wildlife, on tribal territory. *Id.* at 337. In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) and *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), the Court upheld tribal inherent sovereign authority to tax non-Indian activity on tribal land.[3] In addition, in *California v. Cabazon*

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[3] These cases followed and relied on the Court's earlier decision sustaining a tribal permit tax imposed on non-Indians in *Morris v. Hitchcock*, 194 U.S. 384 (1904). *See Merrion*, 455 U.S. at 142; *Colville*, 447 U.S. at 153.

The Court in *Colville* relied upon opinions by "Executive Branch officials . . . [that] consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest," *id.* at 152, and observed that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity" and that "[n]o federal statute . . . shows any congressional departure from this view." *Id.* at 153. The Court held that "[i]n these respects the present cases differ sharply from *Oliphant* . . . in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians." *Id.*

Band of Indians, 480 U.S. 202 (1987), the Court specifically upheld the power of Indian tribes to conduct gaming activities on Indian lands free from state jurisdiction and control. *Id.* at 221-22. These cases make clear, as the Court held in *United States v. Mazurie*, 419 U.S. 544 (1975), that Indian tribes "are unique aggregations possessing attributes of sovereignty over both their members *and their territory*." *Id.* at 557 (emphasis added).

The broad scope of tribal civil regulatory jurisdiction recognized by these decisions confirms the existence of tribal civil adjudicatory jurisdiction over disputes between Indians and non-Indians arising on Indian lands. In *Strate*, the Court recognized the broad scope of tribal civil adjudicatory jurisdiction by holding that "where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate*, 520 U.S. at 453 (quoting *LaPlante*, 480 U.S. at 18).

Thus, when nonmembers are engaged in activities on Indian lands over which tribal regulatory authority extends, whether these activities involve entertainment as in *Cabazon*, recreation as in *Mescalero*, consumer sales as in *Colville*, commercial transactions as in *Merrion*, or participation in internal tribal relations, as in *Williams* and *Santa Clara*, their activities are within the scope of the tribes' civil adjudicatory jurisdiction. Indeed, the role of the court in such disputes is that of a neutral arbiter, rather than active like a legislature, regulatory body or criminal prosecutor. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) ("[legislative jurisdiction] refers to the 'authority of a state to make its law applicable to persons or activities', and is quite a separate

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Thus, the Court concluded in *Colville* that tribal civil powers to tax "are not implicitly divested by virtue of the tribes' dependent status." *Id.*

matter from 'jurisdiction to adjudicate'") (Scalia, J., dissenting) (citations omitted).

When disputes arise from non-Indian presence in connection with these activities, whether sounding in tort, contract, arising under a statute or otherwise, the power of the tribal court to resolve such disputes is recognized. Non-Indians entering a reservation depend upon the existence of a stable legal system and tribal court to resolve any civil dispute that may arise concerning their activities. The provision of such a system, like "police protection and other governmental services" is part of "the advantages of a civilized society that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-38 (citations and internal quotations omitted). In sum, that power, like the power to tax, is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137.

Tribal power to adjudicate civil disputes that arise on Indian lands is also sustained by the tribes' civil regulatory power to exclude non-Indians from such lands. That power includes the authority to condition non-Indian entry onto Indian lands. *See Mescalero*, 462 U.S. at 333. "Nonmembers who lawfully enter tribal lands remain subject to the power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144. Tribal civil adjudicatory jurisdiction over non-Indians may therefore be sustained as a condition to non-Indian entry, presence and conduct on Indian lands. This condition is plainly reasonable – anyone entering the territory of another sovereign surely expects that disputes arising from their activities will be subject to adjudication in the courts of that sovereign. And anyone desiring to avoid being subject to such authority may decline to enter such lands.

C. *Strate* establishes that the main rule of *Montana* and the two *Montana* exceptions only apply to the exercise of tribal inherent sovereign authority over non-Indians on non-Indian-owned fee lands

While recognizing tribal civil jurisdiction over non-Indians on Indian lands, *Strate* and *Montana* both rejected claims of tribal civil jurisdiction over non-Indian activity on non-Indian-owned fee land. *Strate*, 520 U.S. at 456-60; *Montana*, 450 U.S. at 563-567. In so doing, the Court made clear that *Montana*'s main rule and exceptions apply only to claims arising on non-Indian-owned fee lands.

As the Court in *Strate* made clear, *Montana* "describes a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers *on non-Indian land within a reservation*, subject to two exceptions." *Strate*, 520 U.S. at 446 (emphasis added). The Court applied *Montana* based on its prior determination that "the right-of-way, for the purpose at hand [is aligned] with land alienated to non-Indians." *Id.* at 456. On this basis, the Court held that "[o]ur decision in *Montana*, accordingly, governs this case." *Id.* *Strate* thus confirms that "*[r]egarding activity on non-Indian fee land, Montana* delineated – in a main rule and exceptions – the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.'" *Id.* at 453 (emphasis added) (internal citations omitted).

Even if *Strate* had not made this clear, there is certainly nothing in *Montana* to suggest that either the main rule or the exceptions apply to determine the scope of tribal authority over non-Indian activity *on Indian lands*. The *Montana* Court plainly did not apply either the main rule or the exceptions in concluding that tribal power extends to such activity on Indian lands. *Montana*, 450 U.S. at 557. Finally, if more were needed, the decision in *El Paso Natural Gas Co. v. Neztsosie*,

526 U.S. 473 (1999), confirms that *Strate*, and hence *Montana*, apply only to situations involving non-Indian owned fee land. As Justice Souter stated for a unanimous Court "*Strate* dealt [only] with claims against non-members arising on state highways." *Id.* at 482 n.4.

More fundamentally, the Court's rulings in *Williams*, *Mescalero*, *Merrion*, *Colville*, and *Cabazon* establish that on Indian lands, tribal civil jurisdiction exists over Indians and non-Indians alike, and is an element of the tribes' inherent sovereign authority. These cases show that on such lands, there is simply no basis for the contention that tribal inherent power in civil matters has been curtailed. In sum, on Indian lands the existence of tribal civil jurisdiction reflects well-settled law, and is part of the expectations of Indians and non-Indians alike.

Furthermore, the distinction made in *Montana* and *Strate* between Indian land and non-Indian owned fee land is clear from these decisions, as well as in those in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 508 U.S. 679 (1993).[4] In *Montana*, *Brendale* and *Bourland*, the Court considered statutes by which Congress had taken Indian land for the specific purpose of opening reservations to homesteaders or taking lands for flood control projects. The Court concluded in these cases that Congress had also divested tribes of regulatory control over non-Indians on these lands, relying on congressional intent in those statutes. *E.g.*, *Montana*, 450 U.S. at 559-61; *Brendale*, 492 U.S. at 422-23 (opinion of Justice White), 435-37, 441-42, 446-47 (opinion of Justice Stevens); *Bourland*, 508 U.S. at 689-94. For example,

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[4] These decisions confirm that tribal civil jurisdiction over non-Indian activity on non-Indian owned fee land may be shown under the *Montana* exceptions. *Strate*, 520 U.S. at 456-60; *Montana*, 450 U.S. at 565-67; *Bourland*, 508 U.S. at 695-96; *Brendale*, 492 U.S. at 443-44, 456-59.

as the Court explained in *Montana*, Congress would not have intended "that non-Indians purchasing allotted lands would become subject to tribal jurisdiction. . . ." *Montana*, 450 U.S. at 560 n.9. Similarly, in *Strate*, the Court's holding that the highway right-of-way on which the claim arose was the equivalent of non-Indian-owned fee land for purposes of the jurisdictional issue turned on the Court's determination that the right-of-way was congressionally-authorized and had been issued with tribal consent, that the tribe had lost its right to exercise dominion or control over the right-of-way, and that the right-of-way was open to the public as part of the State highway system. *Strate*, 520 U.S. at 455-56. None of the circumstances present in these cases have application to Indian lands, where the rule is otherwise.

However, even if one assumes, *arguendo*, that the *Montana* exceptions have some application to claims of tribal civil adjudicatory jurisdiction over claims arising from non-Indian activity on Indian land, the exercise of this jurisdiction is authorized here.

The first *Montana* exception "covers 'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Strate*, 520 U.S. at 456-57 (quoting *Montana*, 450 U.S. at 565). If "consensual relationships" are required for a tribal court to exercise jurisdiction over a civil case arising on Indian land, then the consensual presence of non-Indians on Indian land establishes such a relationship, and authorizes the exercise of civil adjudicatory jurisdiction for the reasons shown *supra* at 4-13. The second exception, concerning "conduct that 'threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe,'" *id.* at 457 (quoting *Montana*, 450 U.S. at 566), is also satisfied when a dispute arises on Indian land. This is confirmed by the *Strate* Court's reliance on *Williams* to

illustrate a case in which the exercise of tribal jurisdiction is authorized by the second exception. *Strate*, 520 U.S. at 458-59. For the reasons shown *supra* at 4-10, the exercise of tribal civil adjudicatory jurisdiction over claims arising on Indian lands is necessary to preserve the right of reservation Indians to make their own laws and be ruled by them and is thus authorized by the second exception.

D. In furtherance of the Self-Determination policy Congress has encouraged tribal courts to develop and operate effectively, and recognized that these courts exercise general civil adjudicatory jurisdiction over non-Indians

As the Court acknowledged in *LaPlante*, "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *LaPlante*, 480 U.S. at 14-15. In 1934, when Congress enacted the Indian Reorganization Act, federal policy "encouraged tribal governments and courts to become stronger and more highly organized." *Williams*, 358 U.S. at 220. Congress later enacted the Indian Civil Rights Act of 1968, 25 U.S.C. §1301 *et seq.*, which requires tribal courts to adhere to most requirements of the Bill of Rights and the Fourteenth Amendment, provides special training for tribal judges and directs the Interior Department to prepare a model code to govern the tribes' administration of justice. *Id.* §§ 1302, 1311.

In 1993, Congress enacted the Indian Tribal Justice Act ("ITJA"), 25 U.S.C. § 3601 *et seq.*, which established the Office of Tribal Justice Support within the Bureau of Indian Affairs to provide funds, training and technical assistance to tribal court systems. *Id.* § 3611. The Act also established a new system for base support funding for tribal justice systems, *id.* § 3613, and authorized $50 million a year to be appropriated for this purpose, *id.* § 3621(b) – which was about four times the

size of prior federal support provided to tribal courts. *See* H.R. Rep. No. 205, 103d Cong., 1st Sess. 27 (1993) (hereinafter "House Report"); S. Rep. No. 88, 103d Cong., 1st Sess. 3 (1993) (hereinafter "Senate Report"). The increase in funding implements recommendations of the United States Commission on Civil Rights that spending for tribal courts be authorized in amounts equal to that of equivalent state courts. *See* 139 Cong. Rec. H10259, H10262 (daily ed. Nov. 19, 1993) (statement of Rep. Miller, Chairman, House Committee on Interior and Insular Affairs). In addition, $7,000,000 per year was authorized to assist tribal courts in developing tribal codes and rules of procedure, tribal court administrative procedures and court records management systems, and tribal standards for judicial administration and conduct. *See* 25 U.S.C. §§ 3611(e), 3621(a).

In enacting the ITJA, Congress found that "Indian tribes possess the inherent authority to establish . . . tribal justice systems" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. § 3601(4), (6). As the Senate Report shows, the latter finding "was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." Senate Report at 8. The House Report reflects the same understanding, stating that:

> As for non-criminal jurisdiction, Indian tribes have the inherent right to exercise civil jurisdiction within the territory it [sic] controls. Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. Hence, non-Indians may be sued in tribal court. . . .

> The general rule is civil jurisdiction 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.' *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. (1987) at 18.

House Report at 8-9.[5]

When it enacted the Indian Tribal Justice Act, Congress further found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5). The Senate Committee on Indian Affairs added this finding:

> [T]o reflect the decision of the United States Supreme Court in the case of *Montana v. United States*, 450 U.S. 544 (1981), with regard to the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents and the political integrity of the tribe. From all of the testimony presented to the

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[5] The Conference Committee Report likewise stated:

> The Conferees recognize the long standing principle that Indian tribes retain all sovereign authority not expressly divested by the Congress. This principle was articulated by the Supreme Court in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Supreme Court recognized that civil jurisdiction on an Indian reservation "presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. 9 (1987) at 18.

H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (footnote omitted).

> Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority.

Senate Report at 8.

More broadly, the Senate Report concluded that:

> Tribal justice systems are critical to the maintenance and enhancement of the inherent and delegated sovereignty of tribal governments. Except when the Congress has established that federal jurisdiction is exclusive, tribal courts hear cases on virtually all aspects of governmental and private activity. . . .
>
> It is the Committee's view that strong tribal justice systems are necessary both as a function of the exercise of tribal sovereignty and as a means to assure the fair and just administration of the laws enacted by tribal governing bodies and laws enacted by the Congress that require implementation by tribal governments.

Senate Report at 3. As Senator Inouye, Chairman of the Senate Indian Committee, told the Senate when he presented the Indian Tribal Justice Act to the floor:

> While it is a bill that reflects compromise, more fundamentally, it represents the preservation of the sovereign authority of tribal governments to determine the future of their tribal justice systems. Sovereign nations, no matter how limited or expansive their sovereignty might be, can only exercise that

> sovereignty through the legal systems they develop to implement civil and criminal codes and to enforce regulatory provisions.

139 Cong. Rec. S9172, S9176 (daily ed. July 21, 1993).

As these enactments show, Congress has repeatedly recognized that tribal courts play a critical role in tribal self-government, and has encouraged and funded their development, enacted procedural protections which are enforceable in tribal courts, and recognized that tribal civil jurisdiction extends to Indian and non-Indians alike.

E. The power to adjudicate civil disputes arising on a sovereign's territory, whether involving citizens or non-citizens, is essential to the success of the Self-Determination policy and a necessary attribute of sovereignty for Indian tribes as well as other governments

As the Court noted in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), Congress has enacted numerous statutes in furtherance of "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 216 & n.19; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 & n.17 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 138, 143-44 (1980). As the Court further recognized in *Cabazon*, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." 480 U.S. at 219. Indian tribes today are pursuing these goals by developing tribal enterprises, improving the delivery of services to reservation residents and businesses, and enacting laws to provide a stable environment for the growth of the reservation residential and business communities.

All *amici* tribes are engaged in efforts to pursue self-determination and self-sufficiency. All *amici* tribes employ Indians and non-Indians in tribal government positions as well as in tribal enterprises. Indeed, approximately 75-80 percent of the workforce of the *amicus* Ho-Chunk Nation is non-Indian. The *amici* tribes also operate gaming casinos as well as entertainment and recreational establishments on reservation lands. *Cf. California v. Cabazon Band*, 480 U.S. 202 (1987). *Amicus* Confederated Tribes of the Colville Reservation also operate numerous enterprises related to its timber resources which employ hundreds of individuals on the Reservation, including non-Indians. In addition, private businesses of different kinds are located on reservation lands of *amici* Pueblo of Isleta and Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin. Furthermore, all *amici* tribes engage in various commercial and consumer transactions with non-Indians on reservation lands. *Cf. Central Machinery Co. v. Arizona Tax Comm'n,* 448 U.S. 160 (1980); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). The Colville Tribes also frequently enter into contracts with non-Indian business on the Reservation in connection with their forestry enterprises. The *amici* tribes also promote tourism, *see e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), which brings Indian and non-Indians alike to their reservation lands. In addition, many residents of *amici's* reservations are non-Indians or Indians of other tribes who have married tribal members.

These actions are improving the environment for the many and growing number of persons and businesses with an interest in reservation activities for social, entertainment, community, and business purposes. At the same time, as participation in

reservation activities by Indians and non-Indians increases, the importance of tribal civil adjudicatory jurisdiction over disputes arising from these activities becomes more apparent. The exercise of tribal jurisdiction over disputes arising in tribal territory is essential to the tribe's ability to make and apply the law governing relations between Indians and non-Indians on Indian lands. A stable reservation legal environment where civil disputes can be fairly and efficiently resolved is also essential to the achievement of the Congressional goals of tribal self-determination and tribal self-sufficiency. Absent such an environment, tribes will be unable to attract non-Indians to engage in business transactions, patronize tribal enterprises, pursue recreational and tourist activities in tribal territory, and thereby fulfill the congressional purposes. Congress enacted the Indian Tribal Justice Act to promote the resolution of such disputes in tribal courts in an effective and predictable fashion. *See* 25 U.S.C. § 3601(4), (5) and (6).

This is why the *amici* tribes have found it essential to establish tribal courts with general jurisdiction to resolve civil disputes brought before them that arise on the reservation. On all of *amici* tribes' reservations, the tribal courts, including appellate courts, regularly adjudicate cases involving non-Indian parties as plaintiffs and defendants. For example, since 1995, approximately 891 civil cases have been filed in the Tribal Court of the Pueblo of Isleta. In 157 of these cases one of the parties was a non-Indian. Of these 157 cases, 65 were settled out of court, and 51 were resolved in favor of the non-Indian party. Over the same period, 804 civil cases were filed in the Tribal Courts of the Ho-Chunk Nation, which does not generally distinguish between cases filed by members and nonmembers, but which has confirmed that nonmembers appear as plaintiffs and defendants in its courts. The cases filed include general civil matters, child support and domestic violence cases. The State has also appeared as the plaintiff in

the tribal courts of the *amici* Lac du Flambeau Band, Pueblo of Isleta and Ho-Chunk Nation. These cases involve matters such as enforcement of state court orders, garnishment actions, and child support. The *amicus* Colville Tribes have an agreement with the State of Washington providing for modification and enforcement of child support awards against tribal members in tribal court, as a result of which the State appears as plaintiff in numerous cases in tribal court. County child support agencies also frequently appear before the Tribal Court of the Ho-Chunk Nation. Many, if not most, judges in the tribal courts maintained by *amici* are lawyers.

As these caseloads indicate, non-Indians who enter a reservation to do business with a tribe, those who reside on the reservation, and the States as well, depend upon the tribal court to resolve civil disputes that arise from their activities and responsibilities. In these cases, evidence needed for trial is commonly located on the reservation, often far from (and, indeed, beyond the subpoena powers of) the nearest state court. For example, on the Colville Reservation the tribal court is significantly closer to most locations on the Reservation than state courts, which are located as far as fifty miles from the Reservation boundary.

The actions of Congress and this Court protecting the authority of tribes to establish courts exercising general civil adjudicatory jurisdiction over reservations are further complemented by this Court's more general recognition of the interests any sovereign has in providing a forum for resolution of disputes arising on that sovereign's territory but involving non-citizens. Chief Justice Marshall long ago noted the importance to the functions of a government of making courts available for the resolution of disputes and enforcing the law, observing:

> No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-88 (1821); *see also* HENRY M. HART, JR. AND ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 342-43 (Eskridge and Frickey, ed. 1994) (noting the dispute settlement function of courts is important "to the good ordering of society"). These concerns are as important to Indian tribes as they are to any government.

CONCLUSION

This Court's established tradition of sustaining tribal court civil adjudicatory authority over cases involving non-Indians, Congress' understanding and treatment of tribal civil adjudicatory jurisdiction and its specific actions supporting and strengthening tribal courts, and the fundamental importance of tribal courts to the successful implementation of the self-determination policy and to the exercise of tribal self-government all compel the conclusion that the Fallon Paiute-Shoshone Tribal Court has inherent tribal sovereignty to exercise civil adjudicatory jurisdiction over the proceedings before it.

For the foregoing reasons, *amici* urge this Court to affirm the decision of the Ninth Circuit in this case.

Respectfully submitted,

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